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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of)	MM Docket No. 92-316
)	
RIVERTOWN COMMUNICATIONS CO. INC.)	File No. BPH-911008ME
)	
SAMPLE BROADCASTING COMPANY, L.P.)	File No. BPH-911010MA
)	
For Construction Permit)	
for a new FM Station on)	
Channel 282C3 in Eldon, Iowa)	

To: Administrative Law Judge
John M. Frysiak

REPLY TO OPPOSITION TO PETITION TO ENLARGE ISSUES

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March 19, 1993

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SUMMARY

Sample Broadcasting Company, L.P., has requested the addition of basic qualification hearing issues against Rivertown Communications Co., Inc., to examine whether David W. Brown, a principal of the applicant, willfully violated Section 73.1560(b) of the Commission's rules and whether Rivertown had reasonable assurance of its finances as so certified in its pending application.

As to the Section 73.1560 issue, David Brown's self-serving general denial of the factual affidavit of Jeff Hansen, a disinterested third party, does not adequately rebut Sample's argument. Upon weighing all of the evidence presented on this matter, it is clear that extant substantial issues of material fact must be resolved by examination in a hearing.

As to the financial issues, Rivertown failed to follow Commission procedure for certifying an applicant's finances. (1) Rivertown does not

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REPLY TO OPPOSITION TO PETITION TO ENLARGE ISSUES

Sample Broadcasting Company, L.P., ("Sample"), by its attorney,
hereby respectfully replies to the Opposition to Petition to Enlarge
Issues. filed March 9, 1993. by Rivertown Communications Company, Inc.

Sample presented a prima facie case, based on the affidavit of an individual with personal knowledge, that this behavior demonstrates complete disregard for the Commission's rules. As a result, Rivertown is unqualified to become a Commission licensee. Modesto Broadcast Group, 7 FCC Rcd. 3404 (ALJ 1992).

In its opposition, Rivertown does not deny that a purposeful violation of the terms of a broadcast license and Section 73.1560(b) of the Commission's rules is material and just cause for the requested basic qualifications hearing issue. Rivertown focuses instead on the power reduction event itself through an affidavit from David W. Brown.¹ The affidavit supports (1) that Brown was concerned about KMCD signal coverage in Ottumwa, Iowa; (2) that there was an inspection by absentee owners whose final approval was a prerequisite for a transmitter site change; (3) that Jeff Hansen was employed as an engineer by the station at that time; (4) that shortly after the inspection a minor modification application was filed to relocate the KMCD tower to a location which would provide a stronger signal into Ottumwa; and, (5) that one of the station owners was concerned enough about the power reduction incident to conduct a private investigation into the matter. Brown does not specifically deny that the power was reduced, choosing instead to assert generally that "the principal thrust of Hansen's affidavit, and the Sample allegations (sic) based upon it, are simply false."

Brown's rebuttal that no coordination was necessary with an in-

¹ David Bowen's statement is hearsay which does not conform with the requirement of Section 1.229(d) that allegations be supported by affidavits of persons having personal knowledge thereof. Mr. Bowen's statement is not of sufficient weight or reliability to be considered in this proceeding.

dividual at the remote control point misreads Hansen's statement. Hansen stated that Brown remained at the remote control point to confirm that the remote monitor displayed normal readings after the power reduction and recalibration had been performed. Since the transmitter and the studio were not co-located, this was an important aspect of Brown's scheme.

Rivertown's general denial of Hansen's affidavit does not overcome Sample's showing. When presented with contradictory sworn statements by opposing parties, the Commission must weigh all of the evidence before it, including the opposing affidavits, against the allegations and must decide whether the ultimate question of fact is a "substantial" one requiring further inquiry. David Ortiz, supra. Where further inquiry is warranted, the direct conflicts in affidavits can best be resolved by examination of the affiants in the hearing process. Ramon Rodriguez and Associates, Inc., 7 FCC Rod 2633 (1992).

The Commission has been presented with the personal knowledge of Jeff Hansen regarding the KMCD power reduction and the statement of David W. Brown, generally denying Hansen's affidavit. Rivertown presents no other substantive evidence or explanation to the Commission. Moreover, Brown's affidavit must be read in the light of an uncorroborated self-serving statement of a party before the Commission who had a clear motivation to reduce the station KMCD operating power. The materials presented constitute a scenario within that contemplated by the Court and the Commission. The requested issue must be added and resolved in a hearing.

Financial Certification Issue

Sample requested addition of a financial qualifications issue against Rivertown, on the basis of a number of failings. First, Sample demonstrated that Rivertown failed to provide documents sufficient to demonstrate that it had reasonable assurance of a loan commitment from John Pritchard. In its initial document production, Rivertown produced a two-page letter from Mr. Pritchard to David Brown. On the first page, which was dated July 10, 1991, Mr. Pritchard referred to his notes of an apparent June 3, 1991, meeting which listed certain terms of a loan to Brown. Rivertown based its financial certification in large part on these two pages.

In its petition, Sample pointed out many deficiencies in Rivertown's financial documentation. Mr. Pritchard's only offer was to lend the sum of \$240,000 to David Brown for his use in obtaining the construction permit and constructing and operating the station. Nothing from Mr. Pritchard even mentioned Rivertown. No letter from Mr. Brown proposing to make the proceeds from Mr. Pritchard's loan available to Rivertown, let alone giving the terms of any agreement between Brown and Rivertown, was produced. Further, there was no indication that Brown or Rivertown received a statement of Mr. Pritchard's net income after taxes for the previous two years, as required by the instructions to Form 301. While Rivertown exchanged a balance sheet of Mr. Pritchard, it was not dated within 90 days of the certification of Rivertown's financial qualifications, also a requirement of the form's instructions.

Sample also pointed out that there was insufficient documentation to support the proposed funding from Mr. Brown (\$10,000) or Mr. Bowen

(\$15,000) which were indicated in Rivertown's application. As a result, Sample concluded that these sums, totalling \$25,000, would not be available to Rivertown.

In its application, Rivertown stated that it would require \$265,000 to construct and operate its station for three months without revenue. Rivertown claimed the availability of exactly \$265,000, as indicated above. As a result, the disallowance of any of the three funding sources would reduce the funds available to Rivertown to less than the \$265,000 it asserted would be required.

In its opposition, Rivertown attempts to modify some of its prior assertions of fact, and to argue away other matters. Its position does not succeed, however, and Sample's requested issues must be added.

Rivertown concedes that Pritchard's letter of July 10 and his description of a loan based on the June 3 meeting were addressed to Brown, not the applicant. It states that Rivertown was not in existence when Pritchard wrote his letter; Pritchard, in his statement attached to Rivertown's opposition, says that he believed that Brown had not yet

wrote his letter he could not have had Rivertown in mind, for Rivertown was not in existence. Pritchard did not offer to lend the money to Brown or to an entity controlled by Brown, an alternative often contained in documents when the form of the entity is to be determined at a later date. Moreover, had Brown been contemplating an entity other than a sole

~~entity, the Pritchard letter would have so indicated. There is~~

Simply put, an offer of a loan to Mr. Brown is not an offer of a loan to Rivertown.

When the Rivertown application was filed, Brown had not committed to forward funds from Pritchard to Rivertown. His only financial commitment to Rivertown which was expressed in the application is \$10,000, and even that commitment was not supported by adequate documentation. Accordingly, under Commission policy which requires written financial commitments at the time of certification, Rivertown may not be credited with Pritchard's funds.

Rivertown concedes that it did not have information on Pritchard's net income after taxes at the time of its certification and that such information is required by the Commission. It speculates that this information is required only when a lender's balance sheet does not demonstrate sufficient net liquid assets to make the loan. Rivertown offers no basis for its assertion, which is clearly incorrect, for the Commission requires the lender's present balance sheet to make such a demonstration. Rivertown cites no authority for the proposition that an applicant may choose to ignore a specific requirement of Commission policy and yet be financially qualified. Had the Commission not found that a lender's income was important, it would not have imposed the requirement that it be disclosed to the applicant as part of the qualifications process. The requirement for such disclosure in writing is not ancient, as claimed by Rivertown; the Commission specifically included it in revising Form 301 in 1989. In addition, Rivertown provides no rebuttal to the point that Mr. Pritchard's financial statement was out of date, and thus not acceptable for the Commission's purposes.

Sample noted that Bowen's loan letter did not discuss collateral. Rivertown now asserts that there was to be no collateral for this loan. Had that been the understanding at the time the application was filed, the letter would have so stated. Rivertown's argument that Pritchard had taken all available collateral for his loan, so that no collateral remains, is both unpersuasive and inaccurate. Bowen could require a stock pledge, for example. He could also ask for a second position behind Pritchard on the accounts receivable and physical assets as well as Brown's personal guarantee. The Commission requires a statement of collateral in a loan letter to give the applicant reasonable assurance. Albert E. Gary, 5 FCC Rcd 6235 (Rev. Bd. 1990). Bowen's letter omits this necessary term; hence his funds may not be recognized by the Commission.

A further reason to discount Mr. Bowen as a source of funds is that Brown, who certified Rivertown's financial qualifications, had not seen his balance sheet at time of certification. Rivertown's response to this point is merely to assert that Mrs. Bowen "assured Mr. Brown that she and her husband would have no difficulty making such a loan from their immediately available funds." (Rivertown opposition, page 9) The Commission does not accept such blanket statements; its instructions clearly mandate the submission of a current financial statement by each lender. Mere oral assurance of the availability of funds is insufficient. See, e.g., Texas Communications Limited Partnership, 7 FCC Rcd 3186 (1992), which states:

When an individual, and not a financial institution, is a source of funds, the applicant must demonstrate that it ascertained, at the time of certification, that the individual has sufficient resources to meet his financial commitment.

Attempting to shore up its deficient showing, Rivertown submitted a

copy of a bank account statement for the Bowen's business to demonstrate that Mr. Bowen had \$15,000 available to him in August 1991. Rivertown does not allege that Brown was aware of this account when he certified Rivertown's financial qualifications, so this late-presented information is irrelevant to the question of whether Brown's initial certification was accurate. An applicant may not certify its financial qualifications and then set out to obtain financing. Pepper Schultz, 103 FCC 2d 1052, 1058-1059 (Rev. Bd. 1986)

In addition, the mere submission of information on an asset, standing alone, is meaningless. An applicant must demonstrate that the lender has sufficient net liquid assets to make the loan. Even should the lender earmark the funds for the station, which Mr. Bowen has not done, the Commission does not term that reasonable assurance without information on the lender's liabilities. Sunshine Broadcasting, Inc., 6 FCC Rcd 5981 (Rev. Bd. 1991). In this instance, there is no information on the Bowens' personal liabilities, or on the liabilities of Dave's Plumbing and Heating, the holders of the account for which the statement was given. For these reasons, the Commission may not rely upon the Bowen bank account information in determining Rivertown's financial qualifications.

Rivertown claims that there was no need for Brown to prepare a personal balance sheet, to prove he was able to make the \$10,000 contribution stated in the application. He recreated his September 30, 1991, balance sheet and included it with Rivertown's opposition as Attachment B. Brown's liquid assets consisted solely of \$752 in checking and \$52 in savings. His liabilities of \$1,300 exceed this meager amount. The fact that Brown may subsequently have contributed \$8,500 toward

Rivertown's expenses does not demonstrate that such funds were available to him at time of certification. Brown is conspicuously silent as to the source of the \$8,500; it could not have come from his own assets. In any event, it is abundantly clear that Rivertown could not rely on any money from Brown to meet its estimated construction and operating costs when it filed its application.

Rivertown asserts that its estimate of \$265,000 for construction and first three months operation is not accurate, that it includes a "cushion" of over \$28,000, and therefore it needs only the funds from Pritchard to be financially qualified. Rivertown's post hoc description of its budgeting may not be accepted. The instructions to Form 301 clearly call for the applicant to supply in response to Question 2 of Section III of the application, the sum of its construction and operating expenses, as itemized. It is then to indicate the source of at least that amount of money. Any "cushion" would appear as an amount in excess of the amount indicated in response to Question 2.

An applicant's responses to questions on the application form are presumed to be meaningful. They constitute material representations to the Commission. The financial responses are more important than certain other answers because of the Commission's concerns which led to its revisions of Section III of the form. Rivertown now claims that it deliberately put an incorrect number into its application. It did not explain to the Commission that this number included a considerable cushion until its financial qualifications were called into question by Sample.

It has not amended its application to supply the "correct" figure.² The Commission may not accept Rivertown's claim of "cushion" as a means of reducing its costs when such explanation is inconsistent with its application.

Subsequent to the filing of Sample's petition, on March 9, 1993, Rivertown responded to Sample's request for supplement documents. Included among the documents Rivertown provided on that day was a draft of the original FCC application which Brown sent by facsimile to its counsel on September 23, 1991. The cover sheet and draft Section III are appended hereto as Attachment 1. On that draft, Brown indicated that only \$240,000 would be required to construct and operate the station for three months, and that Mr. Pritchard would be providing the sum of \$215,000! Brown and Bowen were to contribute \$10,000 and \$15,000 respectively.

received a letter stating the loan amount as \$240,000 in July? Could it be that the letter from Mr. Pritchard was not written in July, as Rivertown asserts, but much later? The date of Mr. Pritchard's letter is important, for it goes to the efficacy of Rivertown's argument that the form of the applicant was not yet determined when Mr. Pritchard wrote his commitment letter. As noted above, Rivertown was incorporated on August 21, yet Brown was seemingly unaware of the amount of Mr. Pritchard's loan more than a month later.³ The existence of these unanswered questions mandates enlargement of the issues so they may be resolved in a hearing.

Brown's draft also refutes Rivertown's assertion that it did not require a balance sheet of David Bowen before filing its application. Counsel's notes indicate that Brown was aware of the need for a financial statements from each financier prior to the filing of the application. Rivertown has not explained why Brown chose to ignore a requirement of which he was aware. The documents supplied in the pleadings fully demonstrate the existence of significant problems with Rivertown's financial posture at the time of filing.

In sum, Rivertown did not have reasonable assurance of funds from any source when it filed its application. Pritchard was not committed to lend any money to Rivertown and did not provide his income statement. Bowen did not, and has yet to, provide a balance sheet or financial statement, and his letter failed to specify collateral for his proposed

³ The hand written notes supplied in Rivertown's opposition indicate a loan amount of \$240,000 from Mr. Pritchard. However, it is clear that these notes were created on or after September 30, 1991, for they also indicate the amount of money put in by each financing source as of that date. Accordingly, they shed no light on the question of whether Mr. Pritchard wrote his letter before or after Rivertown was incorporated.

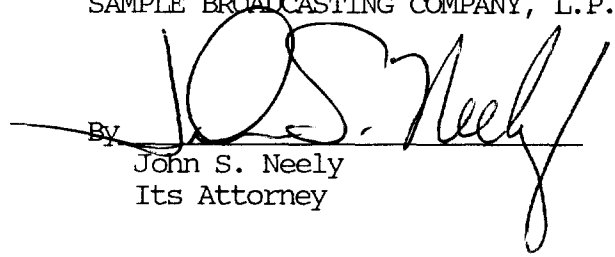
loan. Brown's balance sheet is insufficient to demonstrate assurance of any funds to Rivertown.

Rivertown's financial certification was inaccurate when it was made. Rivertown has not demonstrated reasonable assurance of funds to meet its estimate of construction and operating costs to this date. The financial issues requested by Sample must be added.

Respectfully submitted,

SAMPLE BROADCASTING COMPANY, L.P.

By


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March 19, 1993

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SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this section.

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of March, 1973, a copy of the foregoing document was placed in the United States mail, first class postage prepaid, addressed to the following:

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